

FILED

JUN 17 1983

ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

TERM 1983

NO. _____

STUART BISSETTE,

PETITIONER,

VS.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF

THE STATE OF SOUTH CAROLINA

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QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court err in not allowing Petitioner to establish whether witness-participants in the alleged offense were informers and then pursue the question of their motives and bias?

2. Is it a violation of Petitioner's constitutional right to confront the witnesses against him guaranteed by the Sixth, Fifth, and Fourteenth Amendments of the United States Constitution, for the Court to refuse to let Petitioner declare an investigating officer a hostile witness and impeach him with prior inconsistent statements when Petitioner was taken by surprise by the witness who had testified differently under oath at the preliminary hearing?

3. Is it a violation of Petitioner's rights under the Fifth and Fourteenth Amendments of the United States

Constitution to be required to present himself and thereby testify against himself at an in-court identification procedure that is not a valid test of the witness's ability to identify Petitioner?

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OPINION BELOW

The Opinion in State v. Stuart Bissette, Opinion No. 21907, was filed in the South Carolina Supreme Court on April 20, 1983, and is printed in Appendix A hereto.

JURISDICTIONAL STATEMENT

Jurisdiction to entertain the petition for writ of certiorari is founded upon 28 U.S.C.A. 1257(3) as it is claimed that the petitioner's rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution were violated by the respondent at trial.

On September 29, 1981, a state court jury in Florence County, South Carolina, convicted the petitioner on a two-count indictment charging him with (1) Distribution of hashish and (2) Distribution of cocaine. A timely appeal raising the

petitioner's claim that his constitutional rights had been violated was taken from that verdict to the South Carolina Supreme Court.

The South Carolina Supreme Court upheld the convictions by its opinion dated and filed April 20, 1983.

The judgment rendered by the Supreme Court of South Carolina in this case was entered and filed on April 20, 1983

STATUTORY PROVISIONS RELATING TO THE
JURISDICTION OF THIS COURT

United States Statutes

Title 28 USC 1257

Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:

- (1) By appeal, whereas drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
- (2) By appeal, where is drawn in question the validity of a statute of any State on

the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

- (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Rules of the Supreme Court
of the United States
Rule 17

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the

character of reasons that will be considered.

- (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
- (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals..
- (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to

review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitutional Provisions

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, in the Militia, when an actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be

taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was indicted for and on October 7, 1981, was convicted by a Florence County, South Carolina, jury on two counts: (1) Distribution of hashish, and (2) Distribution of Cocaine. Petitioner was sentenced to serve five (5) years on Count 1 and to serve ten (10) years on Count 2, the sentences to run consecutively. Petitioner appealed his conviction and sentence to the South Carolina Supreme Court. The South Carolina Supreme Court on April 20, 1983, in a written opinion, affirmed the judgment of the lower court.

Petitioner, twenty-three (23), owned and operated an Exxon service station in Florence, South Carolina. The State contended that a State undercover agent Keel made two separate buys of small amounts of contraband drugs from Petitioner: hashish on June 25, 1980, and cocaine on August 15, 1980. The State witnesses testified that on each occasion the investigating officers met a short distance from Petitioner's station just before the buy was to be made.

ARGUMENT

Question One

Did the trial court err in not allowing Petitioner to establish whether witness-participants in the alleged offense were informers and then pursue the question of their motives and bias?

On both occasions Keel was taken from the meeting point to Petitioner's station by one Robin Chapman (informer?),

a girl Petitioner had dated at one time, in her car, and after the buy was made she drove him away. On the first buy in July only Keel and Chapman were in her car. A man named Butler (informer?), whom Robin Chapman married shortly before the trial, rode with the other two investigating officers to where they stopped a block and a half away from Petitioner's station. On the second buy in August Chapman and Keel were accompanied by Butler also. Chapman and Butler did not testify at the trial. Petitioner tried to subpoena these two witnesses to testify but could not locate them to have subpoenas served. (Tr.-260) The State denied knowing their whereabouts. Butler, the witness cooperating with the State, had been arrested on June 3, 1980, by Detective Michell of the Florence Police Department on a drug charge, fifty days before Petitioner allegedly sold hashish to an undercover agent, but

was never prosecuted. (Tr.-253) Petitioner attempted to examine the investigating officers as to whether Butler and Chapman were the informers in the two cases and to go into their motives for trying to frame him. The Court refused (Tr.-256) to let Petitioner pursue these two lines of questioning on the grounds that the officers did not have to identify the confidential informers in these cases and specifically did not allow Petitioner to establish whether Chapman and Butler were or were not informers, and, consequently, then would not permit Petitioner to examine the witnesses as to the informers' motives and bias.

In excluding these lines of cross-examination the Court effectually denied Petitioner the right to confront the witnesses against him (Sixth Amendment), his right to the effective assistance of counsel as guaranteed by the Sixth Amendment, and, as a violation of due process,

his rights under the Fifth and Fourteenth Amendments of the United States Constitution.

Petitioner was reasonably sure that Robin Chapman, whom he had dated several months earlier, and Danny Butler, who had been arrested by one of the investigating officers, were dealing in drugs shortly before the alleged undercover buys were made, but until the investigating officers confirmed that these two witnesses were in fact the informers in the case, Petitioner could not pursue the question of their motivation and bias. Since the trial court did not permit the investigating officers to confirm that these two individuals were informers, it would not permit Petitioner to testify as to their bias and animosity against him. In precluding these lines of inquiry the trial court effectually kept Petitioner from attacking the credibility of the State's witnesses.

The State witnesses said that the two private individuals were present at and witnessed the alleged transactions; their names were voluntarily disclosed by State witnesses on direct examination and before there was any cross-examination (Tr.-18, 22), although the court excluded questions as to whether these two individuals were informers and whether they had been arrested on drug charges shortly before the alleged undercover buy. The Roviaro v. United States, 353 U.S. 53, 1 L.Ed. 2d 339, 77 S.Ct. 623, exception to the rule permitting the State to refuse to disclose the identity of an informer requires the State to disclose the name of informers who witness and participate in transactions constituting the offense charged at the risk of having the prosecution terminated. Petitioner made repeated, sufficient requests that the State witnesses confirm that the two private individuals were informers in the case. (Tr.-44, 253, 254)

The refusal by the trial court to require the investigating officers to confirm the informers' status of the two private individuals violated Petitioner's right to due process (Fourteenth and Fifth Amendments) and his right to confront the witnesses against him (Sixth Amendment). Roviaro requires that an informant's identity be revealed even when he does not testify if disclosure is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." The exclusionary ruling of the trial court cut off effective cross-examination on this point and prevented Petitioner from exposing the motivation of the informers and the relationship of the "informers," the officers, and Petitioner. The right of an accused to fully confront the witnesses against him and the right to freely and fully cross-examine those witnesses are fundamental elements of due process. The trial

court's exclusionary ruling effectually deprived Petitioner of these constitutional rights.

Question Two

Is it a violation of Petitioner's Constitutional right to confront the witnesses against him guaranteed by the Sixth, Fifth, and Fourteenth Amendments of the United States Constitution for the Court to refuse to let Petitioner declare an investigating officer a hostile witness and impeach him with prior inconsistent statements when Petitioner was taken by surprise by the witness who had testified differently under oath at the preliminary hearing?

Petitioner called as his witness at the trial Detective Michell, who had presented the State's testimony at the preliminary hearing. At the preliminary hearing Michell testified that neither he nor the other investigating officer,

Wayne Howard, riding in the back-up car, saw Petitioner on the night of July 25, 1980. But at the trial he testified that he did see him well enough to identify him.

As to the July 25, 1980, Charge:

At the preliminary hearing: (Tr.-249)

Q. Did you have the occasion to see Stuart Bissette (Petitioner) that night (July 25, 1980), did you at anytime that night see Mr. Bissette in person?

A. No, sir, I did not.

At the trial: (Tr.-245)

Q. Did you see Stuart Bissette in person that night?. . .

A. Yes, sir. I'm not going to say 100 percent for sure that it was him, but it was his vehicle and it appeared to be him driving the car.

When Petitioner called Michell as his witness at the trial he did not interview him before putting him on the stand, relying on his sworn testimony as given at the preliminary hearing. When

Michell contradicted the identification testimony he had given at the preliminary hearing, Petitioner moved to have him declared a hostile witness (Tr.-246) and to be permitted to show prior inconsistent statements given at the preliminary hearing. The Court denied these motions. (Tr.-247) The South Carolina Supreme Court upheld this ruling in a three-to-two divided opinion. The three-man majority held that it was in the trial court's discretion whether to declare Michell hostile and that even if Petitioner was surprised that he had to show both actual surprise and harm. The Court said:

"The matter of declaring a witness hostile is for the discretion for the trial judge. State v. Ellefson, 266 S.C. 494, 224 S.C.2d 666 (1976). A witness should not be declared hostile except upon a showing of both actual surprise and harm. State v. Richburg, 250 S.C. 451, 158 S.E.2d 769 (1968). From a review of the entire record we are of the opinion

that even if it be found that defense counsel was taken by surprise, no harm or actual prejudice has been shown. It is apparent that the jury simply did not believe the Defendant and his alibi witnesses."

The dissenting opinion noted that:

"At the preliminary hearing, Officer Michell testified unequivocally he never saw the appellant at the scene of the alleged buy; at trial, Michell testified he did see the appellant. Based on this and other discrepancies in Michell's testimony, appellant moved to have Michell declared a hostile witness. The trial judge denied the motion on the ground appellant's counsel had not interviewed Michell since the preliminary hearing was thus estopped to show surprise.

We have never required counsel to interview a witness prior to trial to confirm the witness will testify consistently with previous sworn testimony. Accordingly, I would hold the trial court improperly denied the motion, reverse and remand for a new trial."

As stated in Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed. 297, 98 S.Ct. 1038, footnote 2 at 306, discussing Henry v. Mississippi, 379 U.S. 443,

13 L.Ed. 2d 408, 85 S.Ct. 564, "His (Chambers) claim the substance of which we accept in this opinion, rests on the cumulative effect of those rulings in frustrating his efforts to develop an exculpatory defense. Although he objected to each ruling individually, petitioner's constitutional claim - based as it is on the cumulative effect of these rulings - could not have been ruled upon prior to the conclusion of Chambers' evidentiary presentation. Since the State has not asserted any independent state procedural ground as a basis for not reaching the merits of petitioner's constitutional claim, we have no occasion to decide whether - if a ground exists - its imposition in this case would serve any 'legitimate state interest.' Id., at 447, 13 L Ed. 2d 408. Under these circumstances, we cannot doubt the propriety of our exercise of jurisdiction."

South Carolina, like Mississippi, subscribes to the common-rule that a party may not impeach his own witness, the so-called "voucher" rule. State v. Ellefson, 266 S.C. 494, 224 S.E.2d 666. The South Carolina Supreme Court in the instant case held that even if Petitioner was taken by surprise "no harm or actual prejudice has been shown." It should be noted that the asserted contradictory statement was to impeach the officer's in-court testimony that he did see Petitioner at the time of the offense when he had testified unequivocally under oath at the preliminary hearing he did not see him.

In Chambers, supra, this Court stated that "The availability of the right to confront and to cross-examine those who give damaging testimony has never been held to depend on whether the witness was initially put on the stand by the accused or by the State."

The statement of the Court in Chambers, supra, 308, is applicable to the facts in this case: "Chambers was denied an opportunity to subject McDonald's damning repudiation and alibi to cross-examination. He was not allowed to test the witness' recollection, to probe into the details of his alibi, or to 'sift' his conscience so that the jury might judge for itself whether McDonald's testimony was worthy of belief." Mattox v. United States, 156 U.S. 237, 242-243, 39 L.Ed 409, 15 S.Ct. 337.

The application of the evidentiary rules of the trial court in this case singly, and especially if taken cumulatively, rendered Petitioner's trial fundamentally unfair and deprived him of due process of law.

Question Three

Is it a violation of Petitioner's rights under the Fifth and Fourteenth

Amendments of the United States Constitution to be required to present himself and thereby testify against himself at an in-court identification procedure that is not a valid test of the witness's ability to identify Petitioner?

When the case below was called for trial, Petitioner was not physically present in the courtroom. Petitioner's counsel, in order to put undercover agent Keel's in-court identification of Petitioner to a meaningful test, moved to have Keel sequestered. (Tr.-7-10) The Court denied Petitioner's motion for sequestration of Keel for the specific purpose of testing Keel's ability to identify Petitioner in a real test, and required that all witnesses would have to be sequestered if any one was. The refusal of the Court to sequester Keel (Tr.-8) before permitting him to take the witness stand and to point to the only Defendant seated at the only Defendant's

table next to the only defense lawyer in the courtroom effectually forced Petitioner to testify against himself.

The Wade-Gilbert¹ exclusionary Rule stems from the guarantee of Defendant's right to counsel contained in the Sixth and Fourteenth Amendments. The specific rights sought to be established in this Petition are based on the Fifth Amendment's guarantee against self-incrimination. It is contended that these three amendments operate interrelatedly to insure that Petitioner will not be forced to incriminate himself in an invalid in-court identification procedure where the court denies Petitioner's motion to sequester the Defendant, thereby depriving Petitioner of the effective assistance of counsel and of due process.

¹United States v. Wade, 388 U.S. 218, 18 L Ed. 2d, 1149, 87 S.Ct. 1926. Gilbert v. California, 388 U.S. 263, 18 L Ed. 2d 1178, 87 S.Ct. (1951).

The due process clause of the Fifth and Fourteenth Amendments forbids a line-up that is unnecessarily suggestive and conducive to an irreparable mistaken identification. Stovall v. Denno, 33 U.S. 293, 18 L Ed. 2d 1199, 87 S.Ct. 1967. The rationale of the rule urged in this Petition is not under-cut by the Schmerber v. California² - like cases which carve out exceptions to the rule that an accused cannot be compelled to testify against himself. The inter-related effect of the Sixth and Fourteenth Amendments of the Wade-Gilbert exclusionary rule operates in regard to crucial line-up identification where the accused was denied the effective assistance of counsel. The traditional in-court identification procedure effectively requires the accused to

²Schmerber v. California, 384 U.S. 757, 16 L.Ed. 2d 908, 86 S.Ct. 1826 (1966).

incriminate himself in an impermissibly suggestive courtroom identification where, under present law, counsel for the accused is powerless to prevent the invalid identification procedure. Some other type cases are held not to violate due process prohibition not solely because such evidence is not of a testimonial or communicative nature, but because such tests in themselves meet due process requirements; thus, Schmerber-type tests are recognized to be scientific-type tests that comply with recognized scientific standards and protocols. Present day in-court identifications violate due process prohibitions; the error involved is not harmless. The ritualistic in-court identification that is implicitly sanctioned if not explicitly approved by the presiding judge is persuasive proof for many jurors. Ritual and ceremony speak persuasively to levels of the mind that the conscious

mind knows not of.

The present day in-court identification is a mischievous anachronism. It smacks of incantations and magical spells. The abolition of the present procedure would at least keep the trial court from giving its tacit imprimatur to a patently prejudicial process. Identification cases more than any other kind of case are susceptible to miscarry tragically. This case provides the court with an opportunity to abolish in-court identification procedures entirely or, at least, require that in-court identifications conform to due process requirements.

At the trial Petitioner's counsel asked that the undercover agent Keel "be sequestered inasmuch as there is an identification problem and we think we would have the right to have that one witness sequestered rather than march the defendant in the courtroom in the

presence of this officer so that he can point him out to the jury and say yes that's the man right there." (Tr.-7) It was the fundamental unfairness of the impermissibly suggestive line-up that produced the Wade-Gilbert exclusionary rule. Courtroom identifications as traditionally and presently conducted are a farce. They produce a ritualistic credibility that is totally undeserved. If the in-court identification is in fact a demonstration of the witness's ability to identify the defendant on the basis of his observations at the time of the alleged offense, then an alleged "in-court identification" where the witness points to the only defendant seated at the defense table is meaningless. The in-court identification ritual as presently conducted has no probative value; nonetheless, the procedure as ritual endows the purported identification with false but significant psychological

weight. Since the process as presently practiced proves nothing but is capable, as ritual, of producing great mischief, it should be abolished, or at least drastically reformed, in order to preserve the Defendant's right against self-incrimination.

The examples of the taking of fingerprints, blood and bodily fluids, voice samples and the like not being self-incriminating are not apposite; these procedures generally are scientifically conducted and are categorically different from the self-incrimination the Defendant is forced to endure when he is forced to exhibit himself at the defense table next to his lawyer and wait for the witness on the witness stand, looking directly at him, to identify him. Contrariwise, in the cases where fingerprints, handwriting samples, and blood samples are taken, those are samples subjected to

meaningful, scientifically valid tests.

It would be difficult to think of any alleged test or procedure that is as totally devoid of logical and scientific validity as the in-court identification test. Conceding that an in-court identification is appropriate in a particular case, the Court should require the identification process to meet reasonable standards that would establish or insure its validity. As critical as the identification issue is in criminal prosecutions, the procedures to test a witness's ability to identify him should be reasonable and valid or they should be abolished.

In this case Petitioner repeatedly asked the Court to sequester Keel and keep the Petitioner away from the courtroom so that a meaningful identification test could be conducted. In refusing to permit a valid in-court identification, the court reflexively based its ruling on precedent and tradition, but in so doing

violated Petitioner's right not to incriminate himself by being required to come into court and sit at the defense table, the place defendants sit.

In-court identification as presently practiced, like the fabled emperor, has no clothes.

At the trial, Petitioner made repeated, alternative efforts to determine the identity of informers, to impeach a witness who had recanted important prior identification testimony and to obtain a valid identification procedure, but in each instance the trial court prohibited the line of questioning and the proposed identification procedure.

On appeal in the South Carolina Supreme Court Petitioner addressed eleven exceptions to the informer issue (Exceptions 5, 6, 7, 10, 11, 12, 14, 15, 19, 21, and 25), two exceptions to the impeachment issue (Exceptions 16 and 17),

and two exceptions to the identification issue (Exceptions 3 and 4).

In his Brief in the South Carolina Supreme Court, Petitioner's Question Two was: "Did the court err in requiring Appellant to appear before the identification witness in Court?" The South Carolina Supreme Court did not address or refer to this ground in its written opinion.

Question Three in Petitioner's Brief was: "Did the court commit reversible error by not allowing (Petitioner) to inquire into the names of the alleged confidential informants and by not allowing the Appellant to inquire into the potential prejudice, bias, or motivation of the persons believed to be involved with the transactions upon which the State brought its case?" The South Carolina Supreme Court did not specifically pass on this ground; the Court presumably accepted that Chapman and

Butler were informers ("They did not on either occasion accompany Keel and the informer. . . .") but did not pass on the prejudicial effect on Petitioner of the lower court's refusal to let Petitioner establish that they were informers and explore the implications of that circumstance.

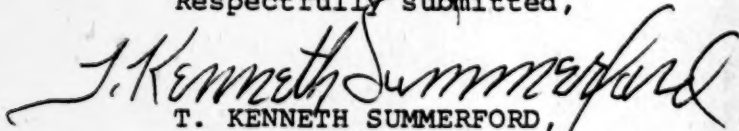
Question Five in Petitioner's Brief was: "Was (Petitioner) entitled to have the witness Gary Michell declared a hostile witness for the purpose of allowing impeachment of witness Michell on prior statements that contradicted his in-court testimony?" The three principal due process violations relied on as the grounds for granting this Petition were preserved in the record by Petitioner and brought to the attention of the Supreme Court of South Carolina in Petitioner's Exceptions and Questions on appeal.

CONCLUSION

Petitioner urges that this case presents an opportunity for this Court to critically review the status and validity of in-court identifications as presently conducted in State courts.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,


T. KENNETH SUMMERFORD,
Attorney for Petitioner

APPENDIX A

THE STATE OF SOUTH CAROLINA

In the Supreme Court

The State, Respondent,

v.

Stuart Bissette Appellant.

Appeal from Florence County

Marion H. Kinon, Judge

Opinion No. 21907

Filed April 20, 1983

AFFIRMED

T. Kenneth Summerford, of Florence; and
S.C. Commission of Appellate Defense, of
Columbia, for Appellant.

Attorney General T. Travis Medlock,
Retired Attorney General Daniel R.
McLeod, Assistant Attorney General
Harold M. Coombs, Jr., and Staff Attorney
Carlisle Roberts, Jr., all of Columbia;
and Solicitor Dudley Saleeby, Jr., of

Florence, for respondent.

LITTLEJOHN, A.J.: The Appellant-Defendant was charged in one indictment on two counts and convicted of: (1) the distribution of hashish on July 25, 1980, and (2) the distribution of cocaine on August 15, 1980, both at his filling station in Florence. He appeals.

The principal witness for the state was South Carolina Law Enforcement Division Officer Mark Keel. He was brought to Florence by local police officers for the purpose of making buys. He testified that on July 25, 1980, he bought about seven and one half grams of hashish from the Defendant, and paid him therefor \$60 in cash. He further testified that some three weeks later, he bought a quantity of cocaine from the Defendant, and paid him therefor the sum of \$420 in cash. Agent Keel positively identified the Defendant as the person from whom the

purchases were made at the Defendant's own filling station. When the cocaine was purchased, Defendant gave to Officer Keel his business card, which was introduced into evidence.

Agent Grady A. Layton, a chemist from SLED, testified that the substance bought on July 25th was hashish, a potent form of marijuana, and the substance bought on August 15th was cocaine and lidocaine.

According to the State's evidence, the filling station was closed when the purchase of the hashish was made early in the evening of July 25th. The Defendant came back to the closed filling station in his blue Trans Am Pontiac, bearing South Carolina license EZK-117, for the purpose of making the sale. It is the testimony of the Defendant that the station was open on that day until 10:30 in the evening while he was servicing equipment of the Sumter Builders

Supply.

As relates to the August 15th purchase of cocaine, it is the testimony of the State that the purchase was made in the station and it was at that time that the business card of the Defendant was given to Agent Keel. It was the testimony of the Defendant and other alibi witnesses that he was sick on that day and was not at the filling station at all.

The Defendant could not testify as to what he did for the Builders Supply on July 25th. No work order was produced and a representative of Sumter Builders Supply had no record of any service having been billed for or paid relative to that date, or during July.

In essence, it is the contention of the Defendant that there was a matter of mistaken identity on both occasions.

Officer Keel of SLED was working with Officer Michell of the Florence City Police Department and Officer Howard of

the Florence County Sheriff's Department. Prior to the sale on July 25th, they placed Agent Keel with an informer. They did not on either occasion accompany Keel and the informer to the filling station but stayed a block and a half away in surveillance. Howard testified that he was familiar with the Defendant's blue Trans Am Pontiac and observed it from the time it left the Defendant's home until it pulled in at the service station to meet Agent Keel and the informer.

At a preliminary hearing, Officer Michell made out the case on behalf of the State, testifying largely from notes of Agent Keel made at the time of the two purchases. He stated that he did not see the Defendant.

The State did not call Officer Michell but defense counsel did. He asked Officer Michell: "Did you see Stuart Bissette in person that night?"

He was obviously referring to July 25th when, according to the testimony, the Defendant drove in the blue Pontiac back to the filling station after it was closed and met Officer Keel and the informer. Michell's answer to the question was as follows:

Yes, sir, I'm not going to say 100 per cent for sure that it was him, but it was his vehicle and it appeared to be him driving the car. I did not speak with him; I did not shake hands with him or anything like that, but it appeared to be him driving the vehicle.

Based on the difference in the testimony, the defense counsel asked that Michell be declared a hostile witness, which was refused. This is alleged to be error. The matter of declaring a witness hostile is for the discretion for the trial judge. State v. Ellefson, 266 S.C. 494, 224 S.C. 2d 666 (1976). A witness should not be declared hostile except upon a showing of both actual surprise and harm. State v. Richburg, 250 S.C.

451, 158 S.E. 2d 769 (1968). From a review of the entire record we are of the opinion that even if it be found that defense counsel was taken by surprise, no harm or actual prejudice has been shown. It is apparent that the jury simply did not believe the Defendant and his alibi witnesses.

Other errors alleged to entitle the Defendant to relief have been considered and found to be without merit.

AFFIRMED.

LEWIS, C.J., and GREGORY, A.J.,
concur. NESS and HARWELL, JJ., dissent.

NESS, A.J. (dissenting): I would reverse.

At the preliminary hearing, Officer Michell testified unequivocally he never saw appellant at the scene of the alleged buy; at trial, Michell testified he did see the appellant. Based on this and other discrepancies in Michell's

testimony, appellant moved to have Michell declared a hostile witness. The trial judge denied the motion on the ground appellant's counsel had not interviewed Michell since the preliminary hearing and was thus estopped to show surprise.

We have never required counsel to interview a witness prior to trial to confirm the witness will testify consistently with previous sworn testimony. Accordingly, I would hold the trial court improperly denied the motion, reverse and remand for a new trial.

REVERSED AND REMANDED.

HARWELL, A.J., concurs.

APPENDIX BEXCEPTIONS AND QUESTIONS NOTICED IN
PETITIONER'S APPEAL TO THE SUPREME
COURT OF SOUTH CAROLINA

Exceptions

1. That His Honor erred in not granting Appellant another Preliminary Hearing since the Preliminary Hearing that was held had been based solely on hearsay without any testimony from a primary source.

2. That His Honor erred in not granting Appellant's request for another Preliminary Hearing in that the State had not complied with Judge Anderson's Order that a full Preliminary Hearing be given.

3. That His Honor erred in requiring the Appellant to appear in Court before identification witness in that the appearance amounted to a one on one lineup in a trial where the central

issue was identification.

4. That His Honor erred in requiring the Appellant to appear in Court before the identification witness under threat of a bench warrant prior to the time of the sequestering of the witness since in an identification question such a procedure would negate the purpose of sequestration.

5. That His Honor erred in not allowing Appellant to question whether Robin Chapman was a confidential informant in that Chapman was a participant in the alleged transaction.

6. That His Honor erred in not allowing Appellant's attorney to question Officer Howard as to whether the State had given Danny Butler any money reward or hope of reward for his assistance in Appellant's case in that it deprived Appellant of an opportunity to impeach information given by Butler and acted upon by law enforcement.

7. That His Honor erred in not allowing Appellant's attorney to question Officer Howard as to whether the State had given Robin Chapman any money reward or hope of reward for her assistance in Appellant's case in that it deprived Appellant of an opportunity to impeach information given by Chapman and acted upon by law enforcement.

8. That His Honor erred in not granting Appellant's Motion for a directed verdict of not guilty at the close of the State's case on the charges alleged to have occurred on July 25, 1980 in that the State failed to produce sufficient evidence to identify the Appellant as the individual who made the alleged sale.

9. That His Honor erred in not granting Appellant's Motion for a directed verdict of not guilty at the close of the State's case on the charges alleged to have occurred on August 15,

1980 in that the State failed to produce sufficient evidence to identify the Appellant as the individual who made the alleged sale.

10. That His Honor erred in not allowing Appellant to testify as to his relationship with Danny Butler in that by excluding such testimony the Court precluded Appellant from showing Butler's motivation in making false allegations against Appellant.

11. That His Honor erred in not allowing Appellant to testify as to his relationship with Robin Chapman in that by excluding such testimony the Court precluded Appellant from showing Chapman's motivation in making false allegations against Appellant.

12. That His Honor erred in not allowing Appellant to testify as to the admissions of Robin Chapman in that Chapman was an agent of the State and a participant in the sales the Appellant

was alleged to have made.

13. That His Honor erred in admitting photographs of Appellant's station by the State in that State's exhibits four (4) and five (5) were not an accurate representation of the scene at Appellant's station on the days in question.

14. That His Honor erred in not allowing Appellant to question the circumstances of the arrest of Danny Butler in that it precluded Appellant from proving the relationship between the Appellant, the State and Danny Butler for impeachment purposes.

15. That His Honor erred in not allowing Appellant to question the circumstances of the arrest of Danny Butler in that it precluded Appellant from proving the relationship between the Appellant, the State and Danny Butler to show a frame of Appellant by Danny Butler to further the interest of Danny Butler.

16. That His Honor erred in not declaring the witness, Gary Michell, a hostile witness in that the witness, Michell, contradicted previous sworn testimony to the surprise of Appellant.

17. That His Honor erred in not allowing Appellant to impeach the testimony of Gary Michell in that the witness, Michell, contradicted previous sworn testimony to the surprise of Appellant.

18. That the State violated the constitutional right of Appellant by not giving Appellant warnings of his right against self-incrimination in that Officer Gary Michell upon arresting Appellant specifically questioned Appellant for the purpose of obtaining identification evidence to be used against Appellant without the necessary warnings.

19. That His Honor erred in not allowing Appellant to question the witness, Joyce Bisette, concerning damage to Appellant's automobile in that it was

relevant to the ill will of Danny Butler and Robin Chapman towards Appellant.

20. That His Honor erred in not allowing Appellant to put his exception in the record outside the presence of the jury as to the Court's refusal to allow Appellant to question Joyce Bissette concerning damage to Appellant's car in that it deprives the Appellant of a full appellant review of the question.

21. That His Honor erred in not allowing the testimony of Joseph J. Bower concerning Danny Butler on the grounds of relevancy in that it deprived Appellant of testimony showing Butler's interest in framing Appellant.

22. That His Honor erred in not granting Appellant's Motion for a directed verdict of acquittal at the close of Appellant's case in that the State failed to present conclusive identification evidence identifying Appellant.

23. That His Honor erred in not granting Appellant's Motion for judgment of acquittal notwithstanding the verdict in that the State failed to produce conclusive evidence identifying Appellant as the individual alleged to have made the sales on July 25, 1980 and on August 15, 1980.

24. That His Honor erred in not granting Appellant's Motion for a new trial in that the State failed to produce conclusive evidence identifying Appellant as the individual alleged to have made the sales on July 25, 1980 and on August 15, 1980.

25. That His Honor erred in not granting Appellant's Motion for a new trial in that His Honor excluded essential testimony thereby limiting Appellant's defense of frame by Danny Butler and Robin Chapman.

Questions

1. Did the Appellant have a valid preliminary hearing consistent with due process and good faith? (Exceptions one (1) and two (2)).

2. Did the Court err in requiring the Appellant to appear before identification witness in Court? (Exceptions three (3) and four (4)).

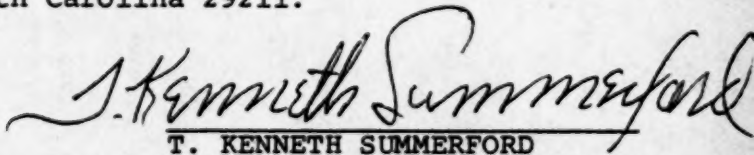
3. Did the Court commit reversible error by not allowing the Appellant to inquire into the names of the alleged confidential informants and by not allowing the Appellant to inquire into the potential prejudice, bias or motivation of the persons believed to be involved with the transactions upon which the State brought its case? (Exceptions five (5), six (6), seven (7), ten (10), eleven (11), twelve (12), fourteen (14), fifteen (15), nineteen (19), twenty (20), twenty-one (21)).

4. Was the Appellant entitled to a directed verdict of not guilty or in the alternative a new trial notwithstanding the jury's verdict? (Exceptions eight (8), nine (9), twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25)).

5. Was the Appellant entitled to have the witness, Gary Michell, declared a hostile witness for the purpose of allowing impeachment of witness Michell on prior statements that contradicted the witness in Court testimony? (Exceptions sixteen (16), seventeen (17)).

CERTIFICATE OF SERVICE

The undersigned counsel for petitioner, hereby certifies that on the 17th day of June, 1983, three copies of petitioner's petition for writ of certiorari were served upon counsel for respondent by mailing the same to the office of the Attorney General for the State of South Carolina at Post Office Box 11549, Columbia, South Carolina 29211.


T. KENNETH SUMMERFORD
Counsel for Petitioner